

STATE OF MICHIGAN  
COURT OF APPEALS

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JOSEPH KLOBERDANZ, Next Friend of  
JEFFREY KLOBERDANZ, a Minor,

Plaintiff-Appellant,

v

SWAN VALLEY SCHOOL DISTRICT,

Defendant-Appellee.

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UNPUBLISHED  
January 31, 2006

No. 256208  
Saginaw Circuit Court  
LC No. 03-047994-CZ

Before: Kelly, P.J., and Meter and Davis, JJ.

DAVIS, J. (*concurring in part and dissenting in part*).

I agree with my colleagues' analysis and conclusion that defendant afforded plaintiff the minimal procedural due process to which he was entitled under the circumstances. I also agree with their statement of the relevant legal standards applicable to this Court's review of an agency's factual findings for supporting competent, material, and substantial evidence. However, I respectfully disagree with their conclusion that substantial evidence existed in this case. I find defendant's conclusion that plaintiff directed a sexual gesture toward the school counselor unsupported by competent, material, and substantial evidence.

There is no dispute that plaintiff made a gesture that involved placing two fingers into his mouth during the school counselor's presentation to plaintiff's class. Plaintiff maintained that he was pantomiming placing a gun in his mouth and shooting himself. The counselor found the gesture "uncomfortable" and believed it had sexual connotations. Plaintiff indicated that he made the gesture while facing a friend and in response to another student asking "a really stupid question." The counselor noted that the gesture did not disrupt the class and admitted that plaintiff had not been looking at her when he made the gesture, but nevertheless believed it had been directed toward her. The factual dispute is not whether plaintiff made the gesture, but what the gesture meant.

Significantly, the counselor admitted that she may have made up her mind about the meaning of the gesture *before* she began investigating it. Furthermore, the assistant principal to whom she reported it misunderstood the counselor's description of the event and therefore believed plaintiff was looking at the counselor at the time. The assistant principal concluded that plaintiff had violated the sexual harassment policy *before* learning otherwise. Both of them interviewed plaintiff's friend, but summarily disregarded the friend's description of events. By the time plaintiff presented his side of the story to the superintendent, the superintendent had

*already* learned that plaintiff “had made a sexual gesture towards Ms. Dils.” He upheld the suspension based entirely on the counselor’s perception that the gesture was both sexual and directed toward her.

I see nothing in the record from which the counselor’s conclusions that the gesture was either sexual or directed toward her can be based. The assistant principal and the superintendent based their conclusions solely on the counselor’s perception of event, even after they learned that the gesture was not what they originally thought. It appears that they reached their decisions based solely on a desire to avoid “questioning her integrity.” Defendant’s factual finding was based not on competent, material, and substantial evidence, or even a choice between two differing views of the evidence, but on deference to a colleague’s subjective interpretation of the event.

I agree with the majority’s statement that there are many tasteless acts a student could perform that would be too trivial to constitute a gross misdemeanor under *Holman v Trustees of School Dist No Five, Twp of Avon*, 77 Mich 605, 608-609; 43 NW 996 (1889). However, the majority concludes that this gesture rose to that level, thus authorizing plaintiff’s suspension, because of its indecent sexual nature. The gesture may have been intended to be disrespectful. However, I find defendant’s conclusion regarding the nature of the gesture unsupported. The fact that the counselor personally found the gesture embarrassing is not enough to conclude that the gesture was “willful or malicious,” “vulgar and lewd,” or “more than a petty or trivial offense.”

I would reverse the trial court’s holding that defendant’s finding that plaintiff directed a sexual gesture at the school counselor was supported by substantial evidence. I would also reverse the trial court’s finding that defendant did not abuse its discretion in suspending plaintiff.

/s/ Alton T. Davis